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No. 10-349

IN THE SUPREME COURT OF THE UNITED STATES

SHELL OIL COMPANY; SWEPI LP (AS SUCCESSOR-IN-INTEREST TO SHELL WESTERN E & P, INC.),
Petitioners,

v.

NANCY FULLER HEBBLE, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, STATE CHAMBER OF OKLAHOMA, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONERS

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Petitioners,

v.

NANCY FULLER HEBBLE, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of this Court, *amici curiae* request leave to file the accompanying brief in support of the above-referenced Petition for a Writ of Certiorari.[1]

[1] Respondents' counsel did not consent to the filing of an *amici* curiae in this action. Petitioners consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. Per Rule 37.2, counsel of record for all parties received notice at least ten days prior to the due date of *amici's* intention to file this brief. Per Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its

As associations that represent businesses of all sizes, *amici* have a substantial interest in ensuring that the determination of punitive damages awards is fair, predictable, and reflects sound public policy, and that such awards are subject to careful appellate review.

Amici seek leave to file a brief in this case because of the continued lack of consistency in application of this Court's punitive damages jurisprudence. Despite this Court's laudable efforts to provide guidance to lower courts as to how to evaluate whether a punitive damage award is excessive, courts reach widely varying results in similar cases. The level of variability that persists can mean the difference between affirming a punitive damage award of $750,000, $53.6 million, or more. Such results hardly provide defendants with the notice and proportionality required by due process.

The proposed brief will show that the decision of the Oklahoma Court of Civil Appeals in this case is emblematic of several ways that lower courts have failed to follow this Court's rulings on punitive damages or have struggled in interpreting their constitutional obligations. The brief will show that the decision below is an example of how some courts have conducted only a cursory review of the Court's mandate to evaluate the reprehensibility of the conduct at issue.

The proposed brief will then examine how lower courts deciding the maximum constitutionally-sustainable ratio of punitive-to-compensatory dam-

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members, or its counsel made a monetary contribution to the preparation or submission of the brief.

ages have differed on how much amounts to a "substantial" compensatory damage award for which this Court has said that a one-to-one ratio is appropriate. The difference in result between application of a 1:1, 4:1, or 9:1 ratio, particularly in cases involving hundreds of thousands or millions of dollars in compensatory damages, is breathtaking. Moreover, by including such elements as prejudgment interest, attorneys' fees, costs, and statutory or treble damages on the compensatory side of the equation, courts may improperly sustain punitive damage awards that would otherwise be deemed excessive.

Amici submit the proposed brief to bring to the Court's attention the profound significance of these issues, and demonstrate the need for guidance from this Court. Civil defendants, including *amici's* members, often have little or no notice of the potential scope of such liability. *Amici*, therefore, respectfully urge this Court to hear this case and provide clear instruction for lower courts to follow.

* * *

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch. To that end, the Chamber has filed more than 1,700 *amicus curiae* briefs in cases of vital concern to the nation's business com-

munity. For over 20 years, the Chamber has participated as an *amicus* in all of this Court's most significant punitive damages cases, including *Exxon Shipping Co. v. Baker* (2008), *Philip Morris USA v. Williams* (2007), *State Farm Mut. Auto Ins. Co. v. Campbell* (2003), *BMW of N. Am., Inc. v. Gore* (1996), *Pacific Life Ins. Co. v. Haslip* (1991), and *Browning-Ferris Indus. v. Kelco Disposal* (1989).

The State Chamber of Oklahoma ("State Chamber") is a business membership organization that has over 2,000 membership locations, representing over 400,000 employees. Currently, 50 percent of the State Chamber's members have 12 or less employees, and 75 percent of our members have less than 100 employees. The State Chamber is a unique, nonpartisan organization. It is the only organization in Oklahoma to represent all types of business and industry in all parts of the state. In addition to businesses, the State Chamber represent schools, foundations, trade associations, local chambers of commerce and other nonprofit organizations which drive our economy. The State Chamber's goal is to make Oklahoma the state of choice for business.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues, including constitutional, common law, and statutory requirements for punitive damage awards.

* * *

Accordingly, a*mici* ask the Court to grant their Motion.

Respectfully submitted,

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Dated: November 12, 2010

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INTEREST OF *AMICI CURIAE*[1]

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400,000 employees. Currently, 50 percent of the State Chamber's members have 12 or less employees, and 75 percent of our members have less than 100 employees. The State Chamber is a unique, non-partisan organization. It is the only organization in Oklahoma to represent all types of business and industry in all parts of the state. In addition to businesses, the State Chamber represent schools, foundations, trade associations, local chambers of commerce and other nonprofit organizations which drive our economy. The State Chamber's goal is to make Oklahoma the state of choice for business.

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STATEMENT OF THE CASE

Amici adopt Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

Due process requires that defendants have "fair notice . . . of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). In a series of cases, this Court has required a *de novo* review of the evidence supporting a punitive damage award, and, while avoiding a "bright line" approach, provided factors for courts to

apply when evaluating whether such an award is excessive. Nevertheless, there is still a level of variability that can mean the difference between affirming a punitive damage award of $750,000, $53.6 million, or more. Such potential outcomes hardly provide defendants with the proportionality and predictability required by due process.

A bevy of lower state courts have treated this Court's rulings on fair notice as if they do not exist. They have ignored the letter of the Court's rulings, their spirit, or both. The result has turned punitive damage justice into a nationwide lottery game. The Court should hear this case and make its punitive damage rules meaningful.

This is why this case provides the vehicle to achieve this goal. It involves the Petitioner's failure to pay net-profits interest on a single contract to a single party. This decision below encompasses several ways that lower courts have failed to follow this Court's rulings on punitive damages or have struggled in interpreting their constitutional obligations. It provides an example of how some courts have conducted only a cursory review of the Court's mandate to evaluate the reprehensibility of the conduct at issue. Proper appellate review of the reprehensibility of the defendant's conduct is a key element in evaluating the maximum supportable compensatory damages multiplier. Careful evaluation of reprehensibility ensures that the measure of punishment is reasonable and proportionate to the defendant's wrongful conduct.

Factors for evaluating the defendant's conduct set forth by this Court in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), include whether

the harm was economic or physical, placed safety at risk, or involved a single incident or repeated conduct, are cast aside. The court below, at best, gave lip service to one factor, a finding of deceptive conduct that permits a punitive damage award in the first place.

A second way the court below ignored this Court's rulings on punitive damages focuses on the ratio between punitive and compensatory damages. This Court has provided instructions on how lower courts should evaluate the maximum permissible ratio. As the instant case reflects, rulings purporting to apply those instructions reflect more confusion than clarity. Courts have allowed vastly deviating awards for similar conduct.

Courts fail to apply standards as to what amounts to a "substantial" compensatory damage award for which this Court has said that a one-to-one ratio of punitive to compensatory damages is appropriate. Here, the court below applied a 4:1 ratio to $750,000 in lost payments of net-profits, adding $12.5 million in pre-judgment interest computed at an already penal 12% rate. The difference in result between application of a 1:1, 4:1, and 9:1 ratio, particularly in cases involving hundreds of thousands or millions of dollars in compensatory damages, is breathtaking.

The instant case also reflects the fact that lower courts are a patchwork quilt in what they count as "compensatory" for purposes of applying the multiplier. Plaintiffs often manipulate the ratio between punitive and compensatory damages by inflating the denominator to include prejudgment interest, attorneys' fees, costs, and statutory or treble damages in

order to improperly justify a punitive damage award that would otherwise be deemed excessive.

For the foregoing reasons, *amici* respectfully urge the Court to grant certiorari in this case and provide standards that promote greater predictability, consistency, and fairness in civil litigation.

ARGUMENT

I. COURTS HAVE FAILED TO PROVIDE CONSTITUTIONALLY MEANINGFUL APPELLATE REVIEW OF PUNITIVE DAMAGE AWARDS

This Court has "instructed courts evaluating a punitive damages [award] . . . to consider three criteria." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001). These guideposts include (1) the reprehensibility of the defendant's conduct; (2) the size of the punitive damage award compared with the actual or potential harm to the plaintiff; and (3) a comparison of the punitive damage award to "civil or criminal penalties that could be imposed for comparable misconduct." *Gore*, 517 U.S. at 583.

This Court did not say that it had merely suggested three *Gore* factors to be applied by lower courts determining the excessiveness of a punitive damage award. Rather, the Court "instructed" courts to consider these factors. *See Cooper*, 532 U.S. at 440. Nevertheless, some courts, such as the court below, recite the criteria, then disregard it. Such review more closely resembles an abuse of discretion approach than a proper reexamination of the evidence supporting the award.

For instance, the Court has found that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575. In *Campbell*, this Court provided five considerations for determining the level of reprehensibility, including whether (1) the harm caused was physical as opposed to economic; (2) the defendant's indifference to or reckless disregard of the health or safety of others; (3) the plaintiff's financial vulnerability; (4) the defendant's conduct involved repeated actions or an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit. 538 U.S. at 419. "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damage award; and the absence of all of them renders any award suspect." *Id.*

The decision below is an example of how some courts disregard considerations that would weigh against a substantial punitive damage award and instead hone in on a single factor that arguably supports it.

The presence of a single reprehensibility factor cautions against application of a high compensatory damages multiplier. For instance, the Sixth Circuit has found that "where only one of the reprehensibility factors is present, a ratio in the range of 1:1 or 2:1 is all that due process will allow." *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 487 (6th Cir. 2007) (finding deceitful conduct in that defendant released album in derogation of plaintiff's copyright by ignoring pre-litigation letters, but that other factors were not present and case involved solely economic harm); *see also Bach v. First Union Nat'l*

Bank, 486 F.3d 150, 155-56 (6th Cir. 2007) (finding that while plaintiff constituted a vulnerable victim, the absence of other factors "significantly undercuts [the plaintiff's] attempts to justify a ratio of 5.57:1 and ruling that $400,000, an amount equal to compensatory damages, was the constitutional limit for the punitive damage award). By this reasoning, when a court evaluates only one reprehensibility factor, and disregards the rest, it has not properly evaluated whether a punitive damage award satisfies due process. This is precisely what occurred in the court below.

It is particularly inappropriate for courts to place undue emphasis on the fifth *Gore* factor, the presence of intentional malice, trickery, or deceit, as the lower court did in this case. In some states, a threshold level of malice or deception is the very trigger for an award of punitive damages under state law. Its absence would preclude any such award. *See, e.g.*, Utah Code Ann. § 78-18-1(1)(a) (requiring malice or fraud or reckless indifference toward, and a disregard of, the rights of others); *Jonathan Woodner, Co. v. Breeden*, 665 A.2d 929 (D.C. 1995), *cert. denied*, 519 U.S. 1148 (1997) (requiring malice for award of punitive damages); *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992) (same). Current Oklahoma law permits an award of punitive damages of no more than $100,000 or an amount equal to actual damages when a defendant acts with reckless disregard for the rights of others; no more than $500,000 or twice actual damages or the amount of the increased financial gain where a jury finds by clear and convincing evidence that the defendant acted with malice; and a higher amount only where there is evidence beyond a reasonable doubt that the de-

fendant acted intentionally and with malice and engaged in life-threatening conduct. Okla. Stat. Ann. tit. 23, § 23-9.1.

In this case, the court below found that the presence of intentional deceit demonstrated "heightened" reprehensibility and thereby justified a more significant punitive damage award than would otherwise be constitutionally permitted. *See* App. at 15a. This type of conclusory reasoning does not constitute a sufficient evaluation of reprehensibility according to the rules set by this Honorable Court.

The court below went even further disregarding the careful appellate review required by this Court. In the instant case, four of the five factors plainly weighed against a finding of highly reprehensible conduct. The harm was purely economic, not physical. The defendant did not commit an act of violence, threaten bodily harm, or place anyone's health or safety at risk. The conduct did not target a particularly susceptible party, such as an elderly or disabled person, or someone otherwise financially vulnerable. Rather, the conduct involved a failure to pay net-profits interest on a single contract to a single party.

In sum, the Oklahoma appellate court ignored all but one of the reprehensibility factors. It solely relied upon the presence of deceit to find the conduct highly reprehensible. The court's ruling, if allowed to stand, would invite derogation of the obligation to conduct a thorough appellate review. Moreover, it would lend credence to the theory that a *quadrupling* of damages is warranted in any case involving statutory violations or tort claims that include an element of deception, regardless of significant differences in

the parties, the type of injury involved, or the plaintiff's actual damages.[2]

This Court should clarify that *de novo* review requires evaluation of each reprehensibility factor and that the failure to do so is reversible error. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63-65 (2d Cir. 2004) (finding a $2.1 billion punitive damage award, which was equal to the amount of compensatory damages and prejudgment interest, was insufficiently supported where the district court "simply stated without elaboration that '[c]onsidering the re-

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[2] In addition to conducting a cursory reprehensibility analysis, the lower courts have ignored, discounted, or otherwise failed to faithfully apply the third *Gore* factor, which evaluates excessiveness of a punitive damage award based on the "civil or criminal penalties that could be imposed for comparable misconduct." *Gore*, 517 U.S. at 583; *see generally* Victor E. Schwartz *et al.*, *Selective Due Process: The United States Supreme Court Has Said that Punitive Damages Must be Reviewed for Excessiveness, but Many Courts are Failing to Follow the Letter and Spirit of the Law*, 82 Or. L. Rev. 33 (2003). Approximately two-thirds of state deceptive trade practices statutes authorize private parties to recover an award of treble damages. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kansas L. Rev. 1, 23-24 (2005). Treble damages are typically computed three times *actual* damages, without regard to prejudgment interest. The Oklahoma Consumer Protection Act, however, provides that an aggrieved consumer may recover actual damages, the costs of litigation including reasonable attorneys' fees, and, if the act or practice is found to be "unconscionable," a civil penalty of up to $2,000 for each violation. *See* Okla. Stat. Ann. tit. 15, § 761.1. Notably, Oklahoma law provides criteria for determining unconscionability that are similar to the factors adopted by this Court for evaluating reprehensibility. *See id.* Thus, had the appellate court considered comparable civil or criminal penalties, this factor would have weighed against the magnitude of the punitive damage award in this case.

prehensibility of defendants' conduct in this case, the Court perhaps would be justified in imposing an award of punitive damages several fold the amount of actual damages awarded'").

II. GUIDANCE ON THE PERMISSIBLE PUNITIVE TO COMPENSATORY DAMAGE RATIO WOULD END VAST INCONSISTENCY, AND PROVIDE GREATER PREDICTABILITY AND FAIRNESS IN THE CIVIL JUSTICE SYSTEM

Selection of the maximum sustainable ratio of punitive to compensatory damages is not only complicated by the failure of lower courts to conduct a thorough reprehensibility analysis, it is exacerbated by confusion as to what constitutes a "substantial" award of compensatory damages. Further, manipulation of what is included as "compensatory" damages for the purposes of applying the multiplier can lead to drastically different outcomes on the same or similar facts. As this Court has recognized, the "stark unpredictability of punitive awards" and "outlier verdicts" are antithetical to due process. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008).

The essence of this Court's punitive damage jurisprudence is that the measure of punishment must be reasonable and proportionate to the amount of harm to the plaintiff resulting from the defendant's wrongful conduct. *See Gore*, 517 U.S. at 580. For this reason, the ratio between punitive and compensatory damages is "the most commonly cited indicium of an unreasonable or excessive punitive damages award." *Gore*, 517 U.S. at 580.

In avoiding a "bright-line" ratio, the Court has provided the following guidance on the ratio between punitive and compensatory damages:

- "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of due process guarantee." *Campbell*, 538 U.S. at 425.
- A 4:1 ratio "might be close to the line of constitutional impropriety." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991); *Gore*, 517 U.S. at 581. This reflects 700 years of history of "providing for sanctions of double, treble, and quadruple damages to deter and punish." *Campbell*, 538 U.S. at 426.
- Higher ratios are appropriate only where "a particularly egregious act has resulted in a small amount of economic damages" and in "cases in which the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine." *Gore*, 517 U.S. at 582.
- "[F]ew awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425.

The problem, as reflected in the decision below, is that many lower courts are either ignoring or manipulating the guidelines. A fundamental reason for this Court to review this case is to let those lower courts appreciate that these are constitutional guidelines, not mere suggestions.

A. Courts Widely Diverge on How Much is a "Substantial" Compensatory Award

In light of the Court's guidelines for determining the appropriate ratio, whether the compensatory damages awarded are considered "substantial" is particularly important. Even courts that are trying to adhere to the guidelines are widely divergent in their approach.

Many courts have found that awards in the range of the $750,000 in net-profit payments here (not including the $12.5 million award of pre-judgment interest) are "substantial" and generally warrant no more than a one-to-one ratio. *See, e.g., Bach*, 486 F.3d at 155-56 (ruling that $400,000, an amount equal to compensatory damages, was the constitutional limit for the punitive damage award involving purely economic harm); *Williams v. Conagra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (in hostile work environment claim, ordering reduction of $6 million punitive damage award to $600,000, reflecting the amount of the plaintiff's compensatory damages, because "[s]ix hundred thousand dollars is a lot of money"); *Zakre v. Norddeutsche Landesbank Girozentrale*, 541 F. Supp.2d 555, 565-67 (S.D.N.Y. 2008) (ordering reduction of $2.5 million punitive damage award to $600,000, upon consideration of the substantial $1.5 million compensatory award for lost wages and emotional distress in gender discrimination and retaliation claim and other *Gore* factors); *Hudgins v. Southwest Airlines, Co.*, 212 P.3d 810, 829 (Ariz. Ct. App. 2009) (ordering remittitur of $4 million punitive award to each plaintiff to $500,000, reflecting the substantial compensatory damages awarded for emotional distress, in case in which

bounty hunters authorized to carry guns by airline were prosecuted).

Some courts view amounts significantly less than $750,000 as "substantial." *See, e.g., Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 54 (1st Cir. 2009) (ordering remittitur of $350,000 punitive damage award to $35,000 to reflect amount of compensatory damages because the defendant's conduct was not "particularly egregious" and although "compensatory damage award was not excessive, it did amply compensate" the plaintiff for his mental distress); *Thomas v. Istar Financial, Inc.*, 508 F. Supp.2d 252, 263 (S.D.N.Y. 2007) (ordering remittitur of $1.6 million punitive damage award to an amount equal to the $190,000 compensatory award for lost wages, which the court considered "a very substantial amount").

Where an amount is not "substantial," but is not "nominal," some courts view a 4:1 ratio as the appropriate limit. *See, e.g., Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 362 (8th Cir. 2009) (involving a $30,000 compensatory award in a retaliation case); *Quigley v. Winter*, 598 F.3d 938, 955-56 (8th Cir. 2010) (ordering remittitur of a $250,000 punitive damage award to four times the plaintiff's $13,685 in compensatory damages in sexual harassment cases against landlord); *Lithia Motors, Inc. v. Yovan*, 204 P.2d 572, 583 (Or. Ct. App. 2009) (reducing $100,000 punitive damage award to $2,000, where $500 award for noneconomic damages for mental anguish "is not insubstantial in the sense that it has actual value in excess of the $200 nominal damage award" provided by statute).

In some cases, however, courts sustain significantly higher ratios, even when there is a large com-

pensatory damage award. The *Campbell* case itself is such an example. In *Campbell*, a nationwide insurer was found to have engaged in bad faith in defending one of its insureds in a wrongful death suit. The trial court awarded the plaintiffs $1 million in compensatory damages and $145 million in punitive damages. This Court characterized the compensatory damage award as "substantial" and providing "complete compensation" for a year and a half of emotional distress. 538 U.S. at 426. It reversed the $145 million punitive damage award and remanded with instructions that "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. The Court also found that there were no factors justifying a breach of this guidepost, as the case involved minor economic injuries, and no physical injury, assault or trauma, and the damages already contained a punitive element *See id.* at 426.

Nevertheless, on remand, the Utah Supreme Court approved a totally inappropriate 9:1 ratio. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 418 (Utah), *cert. denied*, 543 U.S. 874 (2004). In so doing, the Utah Supreme Court opted to apply the single digit maximum that this Court stated was appropriate for cases involving a particularly egregious act resulting in small financial losses, or where the injury is hard to detect or it is difficult to determine the monetary value of noneconomic harm. *See* 538 U.S. at 425.

There are other examples of courts upholding 9:1 ratios even with sizable compensatory damage awards, *see, e.g., Boeken v. Philip Morris Inc.*, 127

Cal. App.4th 1640, 1703 (Cal. Ct. App. 2005), *cert. denied*, 547 U.S. 1018 (2006) (reducing punitive damage award from $100 million to $50 million where plaintiffs' compensatory damages were $5.5 million to reflect a 9:1 ratio), or regarding an award that falls within a 9:1 ratio as presumptively satisfying constitutional standards regardless of the amount of compensatory damages, *see, e.g., United Am. Ins. Co. v. Merrill*, 978 So. 2d 613, 620 (Miss. 2007) (affirming trial court decision finding $900,000 punitive damage award constitutional "since nine times Ms. Merrill's compensatory damages (after the remittitur) exceeds the punitive damages set by the jury. . . .").

Subjecting defendants to such unpredictability and lack of fair notice, permits the very punitive damages gamesmanship that this Court, by its decisions, wanted to stop. *See Haslip*, 499 U.S. at 18 (expressing concern about punitive damages that "run wild").

B. This Case Provides an Important Opportunity to Clarify What Counts as "Compensatory Damages" to Avoid Manipulation of the Denominator

In addition to judicial confusion over maximum sustainable ratio given such factors as the level of reprehensibility and compensatory damages in a given case, courts compromise the ratio approach if they inflate the compensatory side of the equation. Here, Petitioners raise the important question of whether $12.5 million in prejudgment interest, stemming from a 12% prejudgment interest rate, can be properly considered "compensatory" for purposes of assessing the ratio. Pet. at 13-26. The Court should grant

certiorari in this case to better define the appropriate measure of compensatory damages for purposes of evaluating the ratio. What elements of the judgment are, or are not, included can lead to extraordinarily different results.

For instance, in the present case, the variation spans millions of dollars:

Punitive Damages		
Ratio	Without Prejudgment Interest	With Prejudgment Interest
1:1	$750,708	$13 million
4:1	$3 million	$53 million
9:1	$7 million	$ 119 million

Such a wide range of outcomes undermines the core purpose underlying this Court's due process punitive damages jurisprudence: that defendants have fair notice of the potential consequences of their actions.

The issue is larger than the question of the inclusion of prejudgment interest, which is but one of several ways that plaintiffs attempt to manipulate the ratio to permit an otherwise impermissible award. For instance, Oregon courts have allowed inclusion of prejudgment interest, but rejected attempts to (1) look to the plaintiff's total damages, rather than the amount reduced to reflect a portion that the plaintiff failed to mitigate; or (2) look to the plaintiff's total damages, rather than the amount allocated to the particular defendant. *See Hamlin v.*

Hampton Lumber Mills, Inc., 193 P.3d 46, 53-54 (Or. Ct. App. 2008) (citing cases).

Some courts have determined the ratio by dividing punitive damages by an amount that includes the plaintiff's attorneys' fees and costs. *See, e.g., Willow Inn, Inc. v. Public Serv. Mut. Ins. Co.*, 399 F.3d 224 (3d Cir. 2005) (affirming $150,000 punitive damage award on a $2,000 compensatory damage verdict based on finding a 1:1 ratio after including attorneys' fees of $135,000); *Hollock v. Erie Ins. Exchange*, 842 A.2d 409 (Pa. Super. 2004) (finding $2.8 million punitive damage award just barely exceeded the single digit ratio when including attorneys' fees, costs, and interest). Courts have evaluated the constitutionality of punitive damages based on already trebled damages. *Modern Management Co. v. Wilson*, 997 A.2d 37, 57 (D.C. 2010). In addition, awards for pain and suffering or other emotional harm may reflect a jury's desire to punish a defendant. *See generally* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into Punishment*, 54 S.C. L. Rev. 48 (2002).

As these examples show, inclusion of elements of a judgment that do not reflect the particular defendant's wrongful conduct toward the plaintiff, or that otherwise inflate compensatory damages, may lead courts to justify punitive damages far beyond a level supported by due process. This Court can clarify that the amount reflecting the actual harm to the plaintiff caused by the defendant is the proper basis, and that amounts that are categorized "compensatory" but incorporate a punitive element, should not be included. Granting certiorari in this case will show that this Court meant what it said with respect to ending the punitive damages lottery in the United States. Guidance from the Court would provide greater predictability, consistency, and fairness in civil litigation.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court grant the Petition for Writ of Certiorari in this action.

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